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01-779

No. _____

In The

Supreme Court of the United States

MARION THOMPSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Fourth Court Of Appeals,
District Of Texas, San Antonio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Texas, by criminalizing "unreasonable noise", *prima facie* and as applied to the Petitioner, violates the First Amendment of the United States Constitution and this Court's long-standing reverence for pure speech in a public place on a matter of public concern because the criminal statute's overbreadth and vagueness improperly delegate lawmaking authority to policemen, prosecutors, and judges, one of whom admitted at the Petitioner's trial that a basis for arresting a person under the Texas Disorderly Conduct Statute could be for "whispering."

2. Whether the statutory defense provided to constitutional speech in Texas Penal Code § 42.04 fails to limit the unconstitutional vagueness and overbreadth of the "unreasonable noise" statute because the language of this defense allows, not only a police officer, but anyone affected by the speech to order the speaker to stop exercising their First Amendment right or be criminally prosecuted.

3. Whether the Fourth Court of Appeals District of Texas, San Antonio Division's failure to find that the numerous procedural due process errors committed by the trial court so far departed from the accepted and usual course of judicial proceedings that the Petitioner was denied the right to a fair trial as to call for this Court's supervisory powers

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Marion Thompson, the Petitioner herein and Appellant/Defendant below, and the State of Texas, the Respondent herein and the Appellee/State below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Marion Thompson, respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals of Texas, Fourth District, San Antonio in the case of *Marion Thompson v. State of Texas*, Case No. 04-00-00348-CR, Petition for Review denied by Texas Court of Criminal Appeals.

OPINIONS BELOW

In written, filed pretrial motions and during the pretrial hearing held in San Antonio Municipal Court, the Petitioner argued that Texas Penal Code Section 42.01(a)(5) is unconstitutional *prima facie* and as applied to the Petitioner under the Texas and United States Constitutions. [Motion to Set Aside, R.R. "Pretrial Motions, August 26, 1998", *et seq.*] Petitioner's request for a dismissal of the case was denied. [R.R. "Pretrial Motions, August 26, 1998".] On February 17-18, 1999, a jury convicted and fined the Petitioner $150.00. [R.R. vol. 2, p. 167.]

The Petitioner appealed his conviction to Bexar County Court with twelve points of error, including his earlier argument that Texas Penal Code Section 42.01(a)(5) is unconstitutional *prima facie* and as applied to the Petitioner under the Texas and United States Constitutions, but his conviction was affirmed without comment by a visiting judge on May 22, 2000. Bexar County Court at Law #3, Cause No. 106192, App. B, 17-20. On appeal, Petitioner again argued the unconstitutionality of the statute under both state and federal constitutions, but on January 17, 2000, the Fourth Court of Appeals District

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of Texas, San Antonio affirmed the Bexar County Court's decision. Fourth Court of Appeals District of Texas, San Antonio, No. 04-00-00348-CR-App. A, 1-13. No Motion for Rehearing was filed with the Fourth Court of Appeals District of Texas, San Antonio Subsequently, he petitioned the Texas Court of Criminal Appeals, the state's highest criminal court, for discretionary review and renewed all constitutional claims, but on August 1, 2001, the court denied the petition. (The Chief Justice Keller would grant.) App. 23. Petitioner timely files this Petition for Writ of Certiorari in the United States Supreme Court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). On August 1, 2001 the highest criminal court in the State of Texas, the Texas Court of Criminal Appeals, denied Petitioner's request for discretionary review of the judgment of Fourth Court of Appeals District of Texas, San Antonio. (Chief Justice Keller would grant.) App. 23. No rehearing was requested. Petitioner's Motion to Withdraw Mandate is pending in the Fourth Court of Appeals District of Texas, San Antonio.

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. I.

Texas Penal Code Section 42.01(a)(5):

> A person commits an offense if he intentionally or knowingly: . . . makes unreasonable noise in a public place . . . or in or near a private residence that he has no right to occupy.

Tex. Pen. Code Ann. § 42.01(a)(5) (Vernon Supp. 1995). App. 24-25.

Texas Penal Code § 42.04. Defense When Conduct Consists of Speech or Other Expression:

> (a) If conduct that would otherwise violate Section 42.01(a)(5) (Unreasonable Noise) . . . consists of speech or other communication, of gathering with others to hear or observe such speech or communication, or of gathering with others to picket or otherwise express in a nonviolent manner a position on social, economic, political, or religious questions, the actor must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest **if he has not yet intentionally harmed the interests of others which those sections seek to protect.**
>
> **(b) The order required by this section may be given by a peace officer, . . . or any person directly affected by the violation. . . .**

Tex. Pen. Code Ann. § 42.04 (Vernon 1994) (emphasis added). App. 26.

STATEMENT OF THE CASE

On April 4, 1998, as the Petitioner spoke on a public sidewalk about a matter of public concern, San Antonio Police Officer Berrigan angrily proffered his own beliefs, [Reporter's Record (R.R.) vol. 2, p. 62] and spit in the Petitioner's face [R.R. vol. 2, p. 20] as the officer and took from the Petitioner's hands the cardboard cone that he was using to direct his voice in front of a commercial establishment. [R.R. vol. 2, p. 79.] Sometime later, the Petitioner was arrested by a different police officer for continuing to speak through his cupped hands and charged with disorderly conduct under Texas Penal Code Section 42.01(a)(5). App. 15. Although the Petitioner's vehicle was parked a half block away and on the other side of the street from where he was arrested, the car and its contents were searched by three police officers without his consent. [R.R. vol. 2, pp. 24, 27-28; Photo Exhibits 1-6.]

The total disregard for the Petitioner's rights did not end with his arrest. The Petitioner submitted a pretrial Motion to Set Aside and argued that Texas Penal Code Section 42.01(a)(5) is *prima facie* unconstitutional and unconstitutional as applied to the Defendant under both the United States and Texas Constitutions but the motion was denied and set for trial. [R.R. "Pre-Trial Motions" *et seq*. and Motion to Set Aside.] For the first trial setting, Defense Counsel subpoenaed both the police officer who took Petitioner's cone, and the police officer who gave the order to arrest. [R.R. Pre-Trial Motion, February 17, 1999 *et seq*.] But both officers violated the subpoenas, and the State was granted a reset. [R.R. vol. 2, pp. 5-9.] On February 2, 1999, Defense Counsel requested subpoenas

to be served on the two officers who failed to appear at the prior setting. [R.R. Pre-Trial Motion, February 17, 1999 *et seq.*] Nevertheless, on the day of the trial, February 17, 1999, neither of the two previously subpoenaed officers appeared for the trial. [R.R. Pre-Trial Motion, February 17, 1999.] Defense Counsel requested sanctions, a continuance, and a mistrial [R.R. Pre-Trial Hearing, Feb. 17, 1999; R.R., vol. 2, pp. 5-6], but the court denied the requests, and the Petitioner was forced to go to trial for speaking and preaching on a public sidewalk without being able to confront his accusers and without compulsory process for obtaining witnesses in his behalf.

During the trial and in front of the jury, the Petitioner was asked why he needed an attorney to plea if he was not guilty [R.R., vol. 2, pp. 120, 123-125], called a stalker [R.R., vol. 2, pp. 94-95, 99], questioned about where he kept his gun, if he had shot his gun [R.R., vol. 2, p. 100], and questioned about his family's television viewing habits. [R.R., vol. 2, pp. 92-94.] In his defense, the Petitioner was not allowed to present the testimony of an expert witness from the San Antonio Office of Noise Abatement regarding the ability of the City to determine the decibel level of his political speech. [RR, vol. 1, pp. 127-140.] The jury was not charged regarding the Petitioner's rights under the United States and Texas Constitutions to free exercise of religion, speech and assembly. [RR, vol. 2, pp. 152-153.] Ultimately, the Petitioner was convicted of making unreasonable noise near a private residence, without a single witness from a private residence and assessed a $150.00 fine. [RR, vol. 2, pp. 166-167.]

REASONS FOR GRANTING THE WRIT

I. Given the current world situation, it is imperative that this Court act immediately to outline for the Nation the limits on governmental intrusion into personal liberties that this Court will tolerate with respect to freedom of speech.

In these turbulent times, our Nation is at a critical juncture with respect to defining the parameters of civil liberties. As legislators contemplate and hurriedly enact significant changes that will affect all of our lives, this Court is called to provide guidance and outline the extent that governmental intrusion into this realm will be tolerated. Clearly, there will be escalating intrusion on personal liberty by government officials, and legislators will need this Court's guidance in delineating the boundaries government officials must respect. This case will provide this Court with one such vehicle.

As this case exemplifies, police officers, prosecutors, and judges of any city can enforce a seemingly innocuous statute to criminalize unpopular, opposing viewpoints. The pertinent part of the Texas Disorderly Conduct Statute provides that: "(a) A person commits an offense if he intentionally or knowingly; (5) makes unreasonable noise in a public place . . . or in or near a private residence that he has no right to occupy" Tex. Pen. Code Ann. § 42.01(a)(5) (Vernon's 1995) (unreasonable noise statute). The key words at issue for this Court are "unreasonable noise"[1]

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[1] In *Cameron v. Johnson*, 390 U.S. 611, 615-616 (1968), this Court approved the use of the word "unreasonably." But the

In the judgment below, the Court of Appeals, Fourth District of Texas, San Antonio hereinafter (Texas Fourth Court), has characterized Petitioner's constitutionally protected speech as conduct "fall[ing] within the core of conduct proscribed by Section 42.01(a)(5)." App. 7. Whether motivated by bias or merely mistaken, guidance from this Court is imperative to ensure that as citizens express their political views, they are not met with a police officer, prosecutor, or court that punishes political speech under the guise of "unreasonable noise" or as "falling within the core of conduct proscribed" by a disorderly conduct statute. App. 7. Lower level officials and courts need to be instructed regarding what governmental behavior the courts will tolerate with respect to limitations on civil rights.

Specifically, in the current climate of war, it is inevitable that there will be those who choose to protest the war. If these individuals choose to stand on a public street and shout through their cupped hands or a cardboard cone, will they have to fear prosecution for "unreasonable noise"? This Court's previous decisions, and decisions of numerous other federal and state courts, reflect a recognition of the high value the citizens of this country have placed on First Amendment rights. The Texas Fourth Court's decision is in direct conflict with the traditional rationale employed in this Court's First Amendment cases.

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statute before this Court was "otherwise precisely and narrowly drawn." *Reeves v. McConn*, 631 F.2d 377, 383 (5th Cir. 1980).

II. In conflict with this Court's jurisprudence regarding vague and overbroad laws, the Fourth Court of Appeals District of Texas, San Antonio incorrectly decided that Texas Penal Code Section 42.01(a)(5) does not violate the First Amendment of the United States Constitution and should therefore be reversed.

In deciding whether to accept this Petition for Certiorari Review, this Court is being asked to decide whether the State of Texas, by criminalizing constitutionally protected speech, has decided an important question of federal law that conflicts with relevant decisions of this Court. Sup. Ct. R. 10 (1999). As this Court is well aware, overbroad and vague laws, particularly in the criminal context, violate principles of due process under the First and Fourteenth Amendments. *Chaplinski v. New Hampshire*, 315 U.S. 568, 569 (1942) (*citing Covell v. Griffin*, 303 U.S. 444, 450 (1942) and finding that it is clear that freedom of speech "which [is] protected by the First Amendment from infringement by Congress, [is] among the fundamental personal rights and liberties which [is] protected by the Fourteenth Amendment from invasion by State action[ ]"). The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I.

The Petitioner is requesting that this Court grant this Petition for Writ of Certiorari to protect his First Amendment right to freedom of speech against invasion by the

State of Texas. Texas has enacted a criminal statute that criminalizes speech on a public sidewalk about a matter of public concern. Texas courts have upheld this vague and overbroad disorderly conduct statute which conflicts with relevant decisions of this Court with respect to an important question of federal law. Considering this Court's jurisprudence with respect to First Amendment rights, it is ludicrous that Texas courts have upheld this criminal statute which gives police unbridled discretion to arrest, specifically in light of the police officer's testimony at trial.

A. The Petitioner's trial clearly illustrates the statute's overbreadth because a police officer testified that under the "unreasonable noise" statute he could arrest someone for whispering if it is annoying or bothersome to someone else.

During the Petitioner's trial, when Defense Counsel asked the officer to define "unreasonable noise," the officer stated, "When it becomes a nuisance and bothersome to the complainant." [R.R. vol. 1, p. 74.] His response exposed the very essence of the prohibition against unfettered discretion and vague standards. When the officer was asked "if somebody's whispering, and I'm just really annoyed by whispering, could you arrest him, as well, because it annoys me?" [R.R. vol. 1, pp. 74-75.] The police officer initially said that he would investigate. [R.R. vol. 1, p. 75.] Counsel reiterated, "You would investigate and if you found that the person next to me was whispering and I found it offensive, could you arrest that person? [R.R. vol. 1, p. 75.] The Officer replied, "Depending on

the level of noise and all." [R.R. vol. 1, p. 75.] Counsel then asked, "I'm saying a whisper. I'm not talking about any noise level." [R.R. vol. 1, p. 75.] The officer replied, "If I could support what they were saying, yes." [R.R. vol. 1, p. 75.] On re-direct, the Prosecutor further convinced the officer to reaffirm his original statement that whispering could be unreasonable noise:

> Q [City Prosecutor]: I have a question for you regarding the hypothetical that opposing counsel broached to you, regarding whether you could support a whisper as an unreasonable noise. I'll broach my own hypothetical to you. If for instance, someone's in your ear and follows you around all day, whispering in your ear, do you think that would be an unreasonable noise?
>
> A [Officer Urdiales]: Yes.

[R.R. vol. 1, pp. 84-85.] Not only was the officer confused by the vagueness of this statute, but the Prosecutor was equally oblivious to any legitimate and consistent application of this criminal statute – both believe a person could be arrested for whispering, that is – if someone else found the whispering offensive.[2] As this Court has previously noted, "Annoyance at ideas can be cloaked in annoyance at sound." *Saia v. New York*, 334 U.S. 558, 562 (1948).

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[2] The Complainant stated early in her testimony that "what was being said" was more upsetting than the level of the Petitioner's voice. [R.R. vol. 1, p. 103.]

B. The Texas Fourth Court of Appeals' finding that the police officer's command to the Petitioner to stop speaking served to eliminate any claim of vagueness, and is inconsistent with this Court's decisions regarding unbridled discretion of police officers.

The interpretation of Texas Penal Code Section 42.01(a)(5) by the police officer, and the City's prosecutor, and the Fourth Court is clearly inconsistent with the protections provided the citizens of the United States. "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

Particularly problematic in this case is the decision by the Texas Fourth Court which condoned the unconstitutional application of this statute by the police officer. In the Texas Fourth Court's discussion of vagueness, it basically said that the Petitioner could not complain about the vagueness because he had notice that the police officer would arrest him if he continued to speak. App. 7. "Indeed, a presumption that city officials will act in good faith and adhere to standards absent from a regulation's face is the very presumption that the doctrine forbidding unbridled discretion disallows." *Ward v. Rock Against Racism*, 491 U.S. 781, 811 (1989) (internal citations omitted). The danger in this criminal statute is that it allows communication in a certain manner for some and not for others depending on the police officer's point of view.

"This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 764 (1988).

In *Lewis v. City of New Orleans*, 410 U.S. 130 (1974), this Court "vacated [a] conviction and invalidated the ordinance as facially overbroad. Critical to [this Court's] decision was the fact that the ordinance 'punished only spoken words' and was not limited in scope to fighting words . . . " *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). This Court's cases have continually recognized the need to limit governmental intrusion into the realm of constitutional speech. "[I]f some constitutionally unprotected speech must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment." *Id.* n.11.

In addition to being overbroad, under this Court's previous decisions, Texas Penal Code Section 42.01(a)(5) is both vague on its face and as applied to the Petitioner's speech. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 731 (2000). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

> A like threat is inherent in a penal statute, . . . which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (internal citations omitted).

Clearly, the "unreasonable noise" statute failed to limit the harsh and discriminatory enforcement against the Petitioner because it does not aim specifically at evils

within the allowable area of state control by local prosecuting officials and, ultimately, has led to a pernicious restraint on free discussion in Texas.

Since 1876, this Court has held fast to a very basic premise that the Texas Fourth Court has disregarded:

> Although we appreciate the difficulties of drafting precise laws, we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them. As the Court observed over a century ago, "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

City of Houston v. Hill, 482 U.S. 451, 465-466 (1987) (*citing United States v. Reese*, 92 U.S. 214, 221 (1876)).

The Petitioner spoke his message through a small cardboard cone directed at the commercial facility where the complaint was made. [Reporter's Record (R.R.) vol. 2, p. 79.] The decisions of this Court reflect not only why this Petition should be granted, but why, from the perspective of this Court the Petitioner was well within his rights to educate listeners regarding his political position. In *Hill v. Colorado*, this Court reiterates its position that dates back to at least 1949 "by emphasizing that the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be the opportunity to win their attention.' " *Hill v. Colorado*, 530 U.S. 703, 726 (2000) (*citing Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). The Court noted that in the case before it,

that the distance requirement on a speaker's ability to draw attention to his message was saved by the absence of limitation "on the noise level, including amplification equipment," although, noting a previous case where carefully delineated time, place and manner restrictions were upheld, namely, *Madison v. Women's Health Center*, 512 U.S. 753, 772 (1994). *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

This is exactly the intent of the Petitioner. "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention. This is the phase of freedom of speech that is involved here." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). Convincing others regarding an opposing view is exactly what freedom of speech is all about. "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). The Petitioner never "intended to make unreasonable noise" rather his intent was to use his voice with his cupped hands and a cardboard cone to have his ideas be heard by those he sought to convince. "There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

The Petitioner does not believe that any level of noise at anytime, anywhere is acceptable, but as the decisions of this Court illustrate there must be a more exacting standard than arbitrary police discretion. "Noise can be

regulated by regulating decibels. The hours and place of public discussion can be controlled." *Saia v. New York*, 334 U.S. 558, 562 (1948). In clarifying that the standard for evaluating statutes need not be the least restrictive means imaginable, this Court clarified, "To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). But the State of Texas's unlimited prohibition against "unreasonable noise" is plainly outside the boundaries allowed by this Court.

Clearly, it would take a "broad prophylactic" stretch[3], to bring Texas's "unreasonable noise" statute within the bounds of constitutionality as defined by this Court. Because the Texas Fourth Court has decided this important federal question in a way that conflicts with applicable decisions, direction from this Court is required to ensure that First Amendment rights are not unconstitutionally chilled.

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[3] *See NAACP v. Button*, 371 U.S. 415, 438 (1963) (finding "[b]road prophylactic rules in the area of true speech are suspect" and that "[p]recision of regulation must be the touch stone in an area so closely touching our most precious freedoms.")

III. The Texas Fourth Court of Appeals' decision conflicts with a decision of the United States District Court of Appeals for the Fifth Circuit which is the federal circuit responsible for Texas cases. In contrast with the Texas Court of Appeals, other federal circuits have provided free speech protection for individuals similarly situated to the Petitioner.

In 1980, the United States Court of Appeals for the Fifth Circuit, which is responsible for Texas cases, decided a case involving the same issue as this Petitioner seeks review. The case was based on various Houston City Ordinances with one that "prohibit[ed] all sound amplification within 100 yards of a hospital, school, church, or courthouse, or within 50 yards of any residence including a hotel or motel " *Reeves v. McConn*, 631 F.2d 377, 383 (1980). This ordinance, while more narrowly drawn than the unreasonable noise statute at issue in this case, was found void for constitutional overbreadth because it "sweeps so much more broadly than is necessary to protect the City's legitimate interests." *Id.* at 385. The Court of Appeals for the Fifth Circuit cited this Court's opinions for support: "In the public spaces of a city, one is often required to divert his attention or his path rather than ask the State to silence objectionable speech or reasonably amplified speech." *Id.* at 384 (*citing Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) and *Cohen v. California*, 403 U.S. 15, 21 (1971)). "[T]here is probably no more appropriate place for reasonably amplified speech than the streets and sidewalks of a downtown business district." *Id.* at 384.

The Court of Appeals for the Fifth Circuit noted that, "The Supreme Court has approved the use of the word

'unreasonably' in similar statutes that are otherwise precise and narrowly drawn. *Id.* (*citing Cameron v. Johnson*, 390 U.S. 611, 615-16 (1968)). Obviously, when used solely in conjunction with "noise" the statute is not otherwise precise and narrowly drawn. The Court of Appeals for the Fifth Circuit added to clarify, "If actual experience with the ordinance were to demonstrate that it represents a subjective standard, prohibiting a volume that any individual person 'within the area of audibility' happens to find personally 'disturbing,' we would not hesitate to change our judgment accordingly." *Id.* As discussed above, this is the standard the testifying police officer used to arrest the Petitioner.

Similar to the Court of Appeals for the Fifth Circuit's decision regarding broadly worded prohibitions against amplified speech, the United States District Court, Southern District of Texas, Brownsville Division decided a case involving one of Texas's "unreasonable noise" predecessors in *Medrano v. Allee*, 347 F. Supp. 605 (S.D. Tex. 1972). The prior statute's prohibition of "loud and vociferous" language was found unconstitutionally overbroad. *Id.* at 630. However, applying the same logic the current unreasonable noise statute falls into the same pitfalls that the district court viewed as unconstitutionally overbroad as the following language provides:

> It cannot be doubted that the provision regarding the use of loud and vociferous language would, on its face, prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. In so doing, the statute on its face makes a crime out of what is

> protected First Amendment activity. This is impermissible.

Medrano v. Allee, 347 F. Supp. 605 (S.D. Tex. 1972) (*citing University Committee to End War in Viet Nam v. Gunn*, 289 F. Supp. 469, 474 (W.D. Tex. 1968)). Just as in the *Medrano v. Allee* case, "[n]ot only [is the] plaintiff[ ] now facing charges in the Texas courts under these statutes but the evidence shows that these statutes were employed as a tool for the continuous harassment of plaintiff[ ]. The threat of similar acts in the future lingers on." *Medrano v. Allee*, 347 F. Supp. 605, 620 (S.D. Tex. 1972). This is very true in the Petitioner's case. At trial, the jury was not even charged regarding Petitioner's constitutional rights regarding religion, assembly, and speech. [R.R. Vol. 2, pp. 152-153]

The Court of Appeals for the Eighth Circuit reflected this Court's position on vague enforcement guidelines, as it affirmed the soundness of the lower court's decision in declaring an unreasonable noise statute unconstitutional.

> The court reached the 'inescapable' conclusion: 'that the instant ordinance, using no more than the word 'unreasonable' to define what noise is prohibited and being void of indication as to whose sensitivity shall measure a violation lacks that definiteness, both in notice of what conduct is prescribed and in establishment of guidelines for enforcement which precedent has firmly declared to be essential.'

Buffkins v. City of Omaha, 922 F.2d 465, 471 (8th Cir. 1990) (*citing Langford v. City of Omaha*, 755 F. Supp. 1460 (1989); *Pritikin v. Thurman*, 311 F. Supp. 1400, 1402 (S.D. Fla.

1970); *Original Fayette County Civic & Welfare League, Inc. v. Ellington*, 309 F. Supp. 89, 92 (W.D. Tenn. 1970)).

Additionally, the Fourth Circuit Court of Appeals has followed this Court's understanding of acceptable regulation of sound while at the same time being sensitive to constitutionally protected rights. The Fourth Circuits' analysis of an ordinance that prohibited "any unreasonably loud disturbing or unnecessary noise in the city", *Crockett Promotion, Inc. v. Charlotte*, 706 F.2d 486, 488 (4th Cir. 1983), demonstrates how very incompatible the Texas unreasonable noise statute is with the prevailing law in this country.

In *U.S. Labor Party v. Pomerleau*, 557 F.2d 410, 412 (4th Cir. 1977), the court found that " 'right to amplify speech' is within the protection of the First Amendment. Of course, this is not to say that the States or their authorized municipalities may not regulate within reasonable limits such amplified 'speech' or sound." *Crockett Promotion, Inc. v. Charlotte*, 706 F.2d 486, 488 (4th Cir. 1983). In the ordinance before the Court of Appeals for the Fourth Circuit, the words "unreasonably loud, disturbing or unnecessary noise", were further limited by prohibiting sound volume "beyond certain levels, measured in decibels, in particular areas at specified hours of the day". *Id.* In addition, the sound level meter was to comply with standards specified in the American National Standards Institute. The Court of Appeals for the Fourth Circuit contrasted the statute at issue with one of its previous cases, *U.S. Labor Party v. Pomerleau*, 557 F.2d 410, 412 (4th Cir. 1977), where the statute provided that "the point at which the sound volume was measured varied at the caprice of the investigator" *Id.* at 493. The court found

unquestionably that the statute falls within the vagueness prohibition. *Id.* The Court of Appeals for the Fourth Circuit also differentiated the case before it from a case where "the prohibition was not stated in decibel measurements or amperes." *Id.* The Court similarly found that absent the limitations the statute was void for vagueness. *Id.*

Although "the least restrictive means of regulation" was not the valid standard, it found "the reasonableness of its decision be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* (*citing Reeves v. McConn, supra* 631 U.S. at 386). The Court of Appeals for the Fourth Circuit's test provides:

> So long as (1) the regulation is within the constitutional power of the State or its authorized subdivision, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech and (4) the incidental restriction on an alleged First Amendment freedom is no more than is essential to the furtherance of the governmental interest, the constitutional constrictions of the First Amendment are satisfied.

Id. at 488-489. The Texas unreasonable noise statute does not comply with the constitutional constrictions of the First Amendment.

IV. The Texas Penal Code Section 42.04 Defense provided constitutionally protected speech from the "unreasonable noise" statute fails to provide adequate protection to ensure a First Amendment speaker's rights.

A. The Section 42.04 Defense is flawed with respect to the unbridled authority given to the police officer, namely, to order a speaker to cease his or her constitutionally protected activity if the officer or someone else finds this speech, or whispering, "annoying."

The language of the defense in Texas Penal Code Section 42.04 provides that:

> If conduct that would otherwise violate Section 42.01(a)(5) (Unreasonable Noise) . . . consists of speech or other communication . . . to picket or otherwise express in a non-violent manner a position on social, economic, political or religious questions, the actor must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest **if he has not yet intentionally harmed the interests of others which Section 42.01(a)(5) . . . seek[s] to protect.**

Tex Pen. Code Ann. § 42.04 (Vernon 1994) (emphasis added) (hereinafter "Defense").

The Texas legislature in enacting Texas Penal Code Section 42.04 sought to limit the overbreadth of the statute:

> In enacting this statute, the Texas legislature recognized the First Amendment difficulties that could arise when the police are given too free a reign in apprehending those who, in the course of exercising their right to speak, create

> disturbing noise. Section 42.04 provides a defense to prosecution where the offending conduct consists of speech. This defense provides that a defendant must be "ordered to move, disperse or otherwise remedy the violation prior to his arrest if he has not yet intentionally harmed the interest of others which those sections seek to protect."

Mangieri v. Clifton, 29 F.3d 1012, 1017-1018 (5th Cir. 1994). While the Court of Appeals for the Fifth Circuit recognized the problems with the unreasonable noise statute in giving police officers "too free a reign" with respect to constitutional rights, it viewed that for the purpose of determining probable cause to arrest in a Section 1983 action, the Section 42.04 Defense provided police officers with a valid reason for an arrest. As the *Mangieri* case illustrates, the Defense fails to protect speakers engaged in constitutionally protected speech. The issue before the *Mangieri* court was whether a police officer being sued in a Section 1983 case was justified in arresting a speaker who was exercising his constitutional rights. *Id.* Although the criminal charges against Mangieri were dismissed against the speaker, for the purpose of probable cause to arrest, the Fifth Circuit found when a police officer is called to the scene, the speaker can be "ordered to move, disperse or otherwise remedy the violation prior to his arrest **if he has not yet intentionally harmed the interest of others which those sections seek to protect.**" *Id.* (emphasis added). "When [the police officers] saw [the speaker] intentionally disrupting the peace in the public area outside the clinic, the officers possessed the requisite objectively reasonable basis for probable cause to arrest him without a warning." *Mangieri v. Clifton*, 29 F.3d 1012,

1017-1018 (5th Cir. 1994). While the Court never reached the issue of the constitutionally,[4] it found that by merely being called to the scene, the interests of others whom the unreasonable noise statute sought to protect, were injured. Similarly, if a speaker is engaged in constitutionally protected conduct, the defense gives a police officer unbridled discretion to warn any speaker, speaking at any decibel level, to cease exercising his rights or be arrested.

While the Texas Legislature sought to limit the application of the unreasonable noise statute to constitutionally protected speech by enacting Texas Penal Code Section 42.04, it failed to limit its unconstitutional application for additional reasons. The Texas Fourth Court failed to recognize the constitutional incompatibilities and incorrectly found that the defense in Texas Penal Code Section 42.04 "effectively limits the reach of the unreasonable noise provision when constitutionally protected speech of conduct is at issue." App. 4. But this defense is totally inadequate to protect the Petitioner or other speakers engaging in constitutionally protected speech.

Considering the police officer's testimony that whispering could be unreasonable noise, the unreasonable

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[4] Mangieri contended that his "Constitutional rights were violated when the officers failed to abide by a police department policy that required a warning be given prior to an arrest for making unreasonable noise. Mangieri [did] not cite[ ] any authority for his contention that a violation of this police policy gives rise to a deprivation of rights secured by the Constitution." *Mangieri v. Clifton*, 29 F.3d 1012, 1017-1018, n.11 (5th Cir. 1994)

noise defense is totally void of providing any constitutional protection. If the officer mentioned above is called to the scene, that police officer can order a speaker to cease his or her constitutionally protected activity if the officer or someone else finds this speech, or whispering, "annoying." For any reason or no reason, the officer can arrest for failure to comply with his order. Clearly, this is not the robust protection for free speech that the United States Constitution demands.

B. The most problematic aspect of the Section 42.04 Defense is that in addition to a police officer being able to give the command to stop the speech, anyone can give the order.

The third reason the Section 42.04 defense is inadequate to protect those engaged in constitutional speech is evident as the testimony at the Petitioner's trial reveals: The Complainant in this case, the commercial facility employee, was prompted by the City Prosecutor, "Your complaint, was it based on the noise itself or the content of the speech that was used for this particular violation?" [R.R. vol. 1, p. 103.] The Complainant answered that it was "what was being said . . . " [R.R. vol. 1, p. 103.] The Section 42.04 defense provides that the order to cease may be given by "any person directly affected by the violation." This means that the statute would also allow the Complainant or any person upset by what was being said to order the Petitioner, or anyone "expressing a position on social, economic, political, or religious question [ ] to move, disburse, or otherwise remedy the violation . . . " Texas Penal Code Section 42.04. Obviously, Texas Penal Code Section 42.04 does not "effectively limit

[ ] the reach of the unreasonable noise provision when constitutionally protected speech or conduct is at issue[,]" as the Texas Fourth Court erroneously determined. App. 4.

V. Court of Appeals, Fourth District of Texas, San Antonio Division's failure to find that the numerous procedural due process errors committed by the trial court departed so far from the accepted and usual course of judicial proceedings that the Petitioner was denied the right to a fair trial as to call for this Court's supervisory powers.

The facts cited in this Petition for Writ of Certiorari in the section entitled "Statement of the Case" will not be repeated here but highlight the dangers of a statute that criminalizes constitutional speech. The Texas Fourth Court was presented with twelve points of error which individually and in conjunction with each other justify a reversal of the lower court's decision. The Texas Fourth Court, instead of dismissing the charges against the Petitioner, condoned the actions of the police officers, the prosecutor, and the judge. If the regulation and enforcement against unpopular speech is left to the discretion of police officers, prosecutors, and judges, the protections provided by the United States Constitution lose their efficacy. The above facts of the arrest and trial justify reversal.

CONCLUSION

The Petitioner's case offers this Court the opportunity to instruct the lower courts regarding the limits of government intrusion into oral protests in what may become an increasingly heavily litigated area of law, given the projected lengthy duration of the War on Terror and the inevitability that the incidence of demonstrations will increase. In deciding whether to accept this Petition for a Writ of Certiorari, the Petitioner respectfully requests this Honorable Court consider the following words of John Stuart Mill:

> If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

John Stuart Mill, On Liberty, 4th ed., Longman, Roberts & Green, 1869.

Respectfully submitted,

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APPENDIX A

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

[LOGO]

OPINION

No. 04-00-00348-CR

Marion **THOMPSON**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the County Court at Law No. 3,
Bexar County, Texas
Trial Court No. 106,192
Honorable Shay Gebhart, Judge Presiding

Opinion by: Tom Rickhoff, Justice

Sitting: Tom Rickhoff, Justice
Alma L. Lopez, Justice
Sarah B. Duncan, Justice

Delivered and Filed: January 17, 2001

AFFIRMED

A jury convicted appellant, Marion Thompson, of making unreasonable noise, under the Texas Disorderly Conduct statute, and assessed a $250 fine. Appellant raises numerous constitutional and procedural challenges to the trial court's judgment; however, we find that the appellant's constitutional rights were not violated and the trial court's errors, if any, were harmless. Therefore, we affirm.

BACKGROUND

On a Saturday morning in April 1998, appellant and fifteen others were protesting in front of an abortion clinic. The protesters were praying, preaching, and carrying signs. A female protester spoke through an electronic megaphone, and the appellant spoke through a large cardboard megaphone, similar to the type used by cheerleaders.

Eventually, someone inside the clinic called the police. By the time the police arrived, only five or six protesters remained. One of the officers, Robert Urdiales, told the appellant and the woman using the electronic megaphone they were causing a disturbance and he asked them to stop using their megaphones. The woman stopped using her megaphone, but continued her protest. She was not told to stop protesting. The appellant refused to stop using his megaphone, and he was arrested pursuant to the Texas Disorderly Conduct statute. *See* TEX. PEN. CODE ANN. § 42.01(a)(5) (Vernon Supp. 2000).[1] He was the only protester arrested.

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[1] Section 42.01(a)(5) makes it a crime if an individual, intentionally or knowingly, "makes unreasonable noise in a public place other than a sport shooting range, as defined by Section 250.001, Local Government Code, or in or near a private residence that he has no right to occupy." TEX. PEN. CODE ANN. § 42.01(a)(5) (Vernon Supp. 2000).

App. 3

CONSTITUTIONALITY OF TEXAS PENAL CODE SECTION 42.01(a)(5)

Appellant asserts Section 42.01(a)(5) is unconstitutional, both *prima facie* and as applied to him, under the First Amendment to the United States Constitution and Article I, sections 6 and 8 of the Texas Constitution. As with any statute, we begin with the presumption of constitutionality. TEX. GOV'T. CODE ANN. § 311.121 (Vernon 1998).

Before addressing the substance of appellant's argument, we conclude that we need not address appellant's Texas constitutional claims. Appellant has proffered no argument or authority concerning the protection provided by the Texas Constitution or how that protection differs from the protection provided by the United States Constitution. State and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground. *Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993); *Heitman v. State*, 815 S.W.2d 681, 690-91 n. 23 (Tex. Crim. App. 1991). We will not make appellant's state constitutional arguments for him. *Munoz*, 851 S.W.2d at 252.

WHETHER SECTION 42.01(A)(5) IS OVERBROAD

Appellant contends Section 42.01(a)(5) is overbroad because it denies him his constitutional right of free speech.

It is within the State's police power to protect the tranquility, quiet enjoyment, and well-being of the community. *Reed v. State*, 794 S.W.2d 806, 808 (Tex. App. –

Houston [14th Dist.] 1990, pet. ref'd); *Blanco v. State*, 761 S.W.2d 38, 40 (Tex. App. – Houston [14th Dist.] 1988, no pet.). This right of the State is limited only by individual constitutional rights, such as First Amendment free speech. *Blanco*, 761 S.W.2d at 40. Consequently, in analyzing a facial challenge to the overbreadth of a law, we first determine if the statute reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 1191 (1982); *Blanco*, 761 S.W.2d at 40. The present statute does not. *Blanco*, 761 S.W.2d at 40.

Section 42.01(a)(5) punishes conduct that results in "unreasonable noise" in a public place or in or near a private residence. However, any such conduct that consists of speech or other communication is shielded from Section 42.01(a)(5) by a sister statute that creates a defense where any conduct consists of "speech or other communication, of gathering with others to hear or observe such speech or communication, or of gathering with others to picket or otherwise express in a nonviolent manner a position on social, economic, political, or religious questions. . . . " TEX. PENAL CODE ANN. § 42.04 (Vernon 1994). Section 42.04 requires that the actor "be ordered to move, disperse, or otherwise remedy the violation prior to his arrest if he has not yet intentionally harmed the interests of others which [Sections 42.01(a)(5) or 42.03] seek to protect." *Id.* Therefore, Section 42.04 effectively limits the reach of the unreasonable noise provision when constitutionally protected speech or conduct is at issue. *Blanco*, 761 S.W.2d at 40; *Bowie v. State*, 841 S.W.2d 963, 964 (Tex. App. – Beaumont 1992, no pet.); *see also Reed*, 794 S.W.2d at 808 (holding that Section 42.03

("Obstructing Highway or Other Passageway") was not overbroad because of protection afforded by Section 42.04). Further, even without the speech defense of Section 42.04, courts have held that unreasonable noise is not protected speech. *See Blanco*, 761 S.W.2d at 40 and cases cited therein. Because Section 42.01(a)(5) does not threaten constitutional conduct or speech, appellant's overbreadth challenge must fail. *Id.* at 41 (holding that Section 42.01(a)(5) was not overbroad).

WHETHER SECTION 42.01(A)(5) IS VAGUE

Appellant asserts the term "unreasonable noise" is vague because its meaning varies with each listener and invites arbitrary and discriminatory police enforcement.

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreath test may nonetheless be challenged on its face as unduly vague, in violation of due process. *Hoffman Estates*, 102 S. Ct. at 1193. A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that the statute forbids the contemplated conduct and if it encourages arbitrary and erratic arrests and convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 843 (1972). Though based on fairness, the vagueness doctrine "is not a principal designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 1957 (1972).

Because we are limited to the use of words, we can never demand mathematical certainty from our language. *Grayned v. City of Rockport*, 408 U.S. 104, 92 S. Ct. 2294, 2300 (1972). While Section 42.01(a)(5) does not define "unreasonable noise," words not defined are to be given their plain meaning. *Blanco*, 761 S.W.2d at 42. "Noise" commonly means a loud, confused, or senseless outcry; a sound noticeably loud, harsh, or discordant; or a din or uproar of persons. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1533 (1981). "Unreasonable" is modified by intentionally or knowingly and is an objective, reasonable man standard. *Blanco*, 761 S.W.2d at 42. The intent requirement mitigates any possible vagueness and further narrows the meaning of the statute. *Hoffmann Estates*, 102 S. Ct at 1193-94. This narrowness ensures that those of ordinary intelligence have reasonable opportunity to know what is prohibited and ensures that no discriminatory enforcement is likely to occur. *Blanco*, 761 S.W.2d at 41 (holding that Section 42.01(a)(5) was not vague); *Bowie*, 841 S.W.2d at 964-65 (same).

Further, Section 42.01(a)(5) does not allow for broad discriminatory or subjective enforcement. Although it does allow some degree of police judgment, that degree is confined to the reasonableness of the noise and the demonstrated intent of the violator. *Blanco*, 761 S.W.2d at 42; *see also Grayned*, 92 S. Ct. at 2302 (vagueness dispelled by ordinance's requirement that acts be "willfully done"). Any statute, save those of strict liability, necessarily involves police discretion for enforcement. *Blanco*, 761 S.W.2d at 42. The Texas Disorderly Conduct statute likewise involves police discretion in maintaining the public

peace while guaranteeing to every citizen fair notice of proscribed conduct. *Id.*

The appellant had adequate notice that his continued use of the megaphone was prohibited. He had a clear choice between acting lawfully or unlawfully; he chose to continue using his megaphone. His conduct falls within the core of conduct proscribed by Section 42.01(a)(5). He cannot now claim lack of fair warning that he was at criminal risk.

DENIAL OF MOTION FOR CONTINUANCE

Appellant asserts the trial court erred in denying his motion for continuance because three witnesses violated subpoenas and did not appear. Appellant argues the trial court's denial of his motion for continuance is constitutional error because it violates his right of confrontation and right to compulsory process. TEX. R. APP. P. 44.2(a) (Constitutional Error).

While nearly any error can be said to somehow involve a constitutional right, the error complained of here is not granting a continuance of trial. A motion for continuance is regulated by statute. *See* TEX. CODE CRIM. PROC ANN. art. 29.01, *et. seq.* (Vernon 1989 & Supp. 2000). Because the right to a continuance is a statutory right, not a constitutional right, harm analysis must be conducted under Rule 44.2(b). Under this appellate standard, reversal is required only if the appellant's substantial rights were adversely affected.

Granting or denying a motion for continuance is within the sound discretion of the trial court. *See* Article

29.01, *et. seq.*; *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996); *Heiselbetz v. State*, 906 S.W.2d 500, 511 (Tex. Crim. App. 1995). In order to establish an abuse of the trial court's discretion, an appellant must show that the denial of his motion resulted in actual prejudice. *Janecka*, 937 S.W.2d at 468. Appellant asserts he should have been allowed to question the other officers at the scene to establish why he was arrested and to contradict Urdiales' testimony that he "bumped" another officer. However, appellant has not established any specific harm arising from the trial court's denial of his motion for continuance. Appellant's conclusory statement that he was harmed because he was denied the right to present a defense does not establish that the trial court abused its discretion.

STATE'S QUESTIONS REGARDING CHOICE OF COUNSEL

The State asked the appellant why he would not enter a plea without counsel. Defense counsel objected, and the objection was sustained. When the State continued the line of questioning, defense counsel again objected. The trial court overruled the objection. Appellant argues, in a conclusory fashion, that the trial court's ruling amounted to constitutional error. Appellant offers no authority to support this contention, and has waived error. TEX. R. APP. P. 38.1(h).

DIRECTED VERDICT

At the close of the State's case-in-chief, appellant asked for a directed verdict, which was denied. Appellant

contends the State did not prove he intentionally and knowingly made unreasonable noise or that a person in a private residence actually heard the noise.

The standard for review applicable to a motion for directed verdict is the same as that used in reviewing the legal sufficiency of the evidence. *Havard v. State*, 800 S.W.2d 195, 199 (Tex. Crim. App. 1989). The reviewing court must consider all the evidence in the light most favorable to the verdict and ask whether any rational trier of fact could have found beyond a reasonable doubt all the elements of the offense. *Id.*

Contrary to appellant's assertions, Section 42.01(a)(5) does not require proof that a homeowner actually heard the complained-of noise. Section 42.01(a)(5) requires only that the unreasonable noise be "in or near a private residence" that the defendant has no right to occupy. Officer Urdiales testified that the unreasonable noise occurred outside an abortion clinic that was located about 50 feet from a mobile home park. Urdiales said if he had been asleep inside one of the mobile homes, the noise would have awakened him. Urdiales participated in a demonstration with the prosecutor, using the appellant's megaphone, to show the jury the level of noise made by the appellant. The clinic's administrator testified the noise was so loud inside the clinic that the doctor had to speak louder to be heard by the patients, and one of the patients put her hands over her ears.

The State also produced evidence that the appellant intentionally and knowingly made unreasonable noise. Urdiales told appellant that he was making unreasonable

noise and asked him to stop using the megaphone. Appellant refused.

The evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that appellant intentionally and knowingly made unreasonable noise at or near a private residence.

EXPERT TESTIMONY

Defense counsel called Ruben Castillo, a City of San Antonio Code Compliance officer as an expert witness. The trial court did not allow Castillo to testify as an expert. On appeal, appellant contends that because the jury was not allowed to hear Castillo's testimony, he was denied the opportunity to demonstrate that an objective measurement of noise decibels could have been taken at the time of his arrest.

The admissibility of evidence under Texas Rules of Evidence 403[2] and 702[3] is determined by the trial court, and that determination will not be reversed on appeal unless the trial court abused its discretion. *Ortiz v. State*, 834 S.W.2d 343, 346-47 (Tex. Crim. App. 1992); *see also*

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[2] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403.

[3] "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." TEX. R. EVID. 702.

Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991). The question of whether a witness offered as an expert possesses the required qualifications rests largely in the trial court's discretion. *Penry v. State*, 903 S.W.2d 715, 762 (Tex. Crim. App. 1995). Absent a clear abuse of that discretion, the trial court's decision to admit or exclude testimony will not be disturbed. *Id.* The threshold determination for a trial court to make regarding the admission of expert testimony is whether that testimony will help the trier of fact understand the evidence or determine a fact in issue. *Duckett v. State*, 797 S.W.2d 906, 910 (Tex. Crim. App. 1990). The party proffering the expert witness bears the burden of showing that the witness is qualified on the specific matter in question. *Penry*, 903 S.W.2d at 766.

Defense counsel attempted to lay a foundation for Castillo's expertise regarding noise. However, Castillo's testimony indicated that his expertise lay in reading noise decibel levels, not in noise generally. Because there was no decibel level reading in this case, and Section 42.01(a)(5) does not contain such a requirement, the trial court did not abuse its discretion in determining Castillo's testimony was not relevant and would not assist the jury.

THE STATE'S QUESTIONS

The appellant asserts the trial court erred in allowing the State to (1) accuse him of being a stalker, (2) question him about an unrelated subsequent event, and (3) ask him whether he owned or had ever used a gun. Appellant contends the trial court's rulings were error because the

sole purpose behind the State's questions was to "infuriate the jury," thus denying him a fair trial.

A reviewing court should disregard the erroneous admission of evidence if the overwhelming evidence indicates that the erroneous evidence did not adversely affect the jury's verdict, or had only a slight effect on the jury's verdict. *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989). However, "it is the effect of the error and not the other evidence that must dictate the reviewing court's judgment." *Id.* at 588. In exercising its judgment, the *Harris* Court instructed the reviewing court to consider: (1) the source of the error, (2) the nature of the error, (3) whether or to what extent it was emphasized by the State, (4) the probable collateral consequences of the error, (5) how much weight a juror would probably place on an error, and (6) whether declaring the error harmless would encourage the State to repeat it with impunity. *Id.* at 587.

Here, there was ample evidence to support the jury's verdict. The source of the error, if any, was the trial court because the alleged error was brought to the court's attention by defense counsel's objections. There is little likelihood the error will be repeated with impunity given that the prosecutor never mentioned the so-called "stalking" incident or appellant's ownership of a gun during closing argument. After looking at the record as a whole, we conclude that any potential impact of the testimony was, at best, slight. Consequently, any error committed by the trial court in admitting the evidence was harmless.

THE JURY CHARGE

The appellant asserts the trial court erred in denying his request for jury instructions (1) on his rights under the United States and Texas Constitutions regarding free speech, free exercise of religion, and assembly; (2) informing the jury of an "unreasonable noise presumption";[4] and (3) allowing the jury to consider why certain witnesses were unavailable at trial.

Appellant argues, in a conclusory fashion, that the trial court's rulings amounted to reversible error. Appellant offers no authority to support this contention, and has waived error. TEX. R. APP. P. 38.1(h).

CONCLUSION

We overrule appellant's points of error and affirm the trial court's judgment.

Tom Rickhoff, Justice

DO NOT PUBLISH

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[4] The appellant requested the following instruction: "A person is presumed to have made 'unreasonable noise' if *after* he receives notice from a magistrate or a peace officer, he makes a noise that exceeds 85 decibels."

App. 14

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

[LOGO]

JUDGMENT

No. 04-00-00348-CR

Marion **THOMPSON**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the County Court at Law No. 3,
Bexar County, Texas
Trial Court No. 106,192
Honorable Shay Gebhardt, Judge Presiding

BEFORE JUSTICE RICKHOFF, JUSTICE LOPEZ,
AND JUSTICE DUNCAN

In accordance with this court's opinion of this date, the judgment of the trial court is AFFIRMED.

Signed January 17, 2001.

Tom Rickhoff

APPENDIX B

COMPLAINT: DISORDERLY CONDUCT – UNREASONABLE NOISE IN OR NEAR A PRIVATE RESIDENCE

THE STATE OF TEXAS
COUNTY OF BEXAR

IN THE MUNICIPAL COURT OF THE CITY OF SAN ANTONIO BEXAR COUNTY, TEXAS

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

BEFORE ME, THE UNDERSIGNED AUTHORITY, ON THIS DAY PERSONALLY APPEARED THE UNDERSIGNED AFFIANT, WHO, AFTER FIRST BEING BY ME DULY SWORN, ON OATH, DEPOSES AND SAYS THAT, BASED ON CITATION 98193605 AND THE ATTACHED REPORT FURNISHED AND ISSUED BY URDIALES, ROBERT ANTONY A POLICE OFFICER, OF THE CITY OF SAN ANTONIO, BEXAR COUNTY, TEXAS, WHO WITNESSED THE VIOLATION, HE HAS GOOD REASON TO BELIEVE, AND DOES BELIEVE THAT THOMPSON, MARION, ON OR ABOUT THE 04 DAY OF APRIL, 1998, AND BEFORE THE MAKING AND FILING OF THIS COMPLAINT, WITHIN THE CORPORATE LIMITS OF THE CITY OF SAN ANTONIO, IN BEXAR COUNTY AND THE STATE OF TEXAS, DID THEN AND THERE INTENTIONALLY AND KNOWINGLY MAKE AN UNREASONABLE NOISE IN OR NEAR A PRIVATE RESIDENCE LOCATED AT 5800 BLOCK OF JOINER AVENUE, THAT HE/SHE HAD NO RIGHT TO OCCUPY, CONTRARY TO AND IN VIOLATION OF CHAPTER 42, SECTION 42.01(A)(5) OF THE PENAL CODE OF THE

STATE OF TEXAS, AND SUBJECT TO THE PENALTIES THEREOF, AND

[LOGO]

AGAINST THE PEACE AND DIGNITY OF THE STATE:

/s/ Rebecca Trump
(AFFIANT)

SWORN TO AND SUBSCRIBED BEFORE ME THIS 07 DAY OF APR 1998

[STAMP] /s/ Elizabeth Garcia
CLERK, MUNICIPAL COURT OF CITY OF SAN ANTONIO, BEXAR COUNTY

COMPLAINT ID: 2022A
032591: PC SECTION 42.01(A)(5)

APPENDIX C

COUNTY COURT AT LAW NO. #3	§	IN THE COUNTY OF BEXAR
VISITING JUDGE, CLAUDE D. DAVIS	§	SAN ANTONIO, TEXAS

OPINION
Cause No. 106192

MARION THOMPSON, APPELLANT — STATE OF TEXAS, APPELLEE

On Appeal From The San Antonio
Municipal Court
of
Bexar County, Texas
Cause Number B761743

(Filed May 22, 2000)

ORAL ARGUMENTS HEARD: MAY 5, 2000

APPELLANT'S ARGUMENTS:

POINT OF ERROR NUMBER 1: Texas Penal Code §42.01(a)(5) is unconstitutional, both prima facie and as applied to the defendant, under the First Amendment of the United States Constitution and Article 1, §§ 6 and 8 of the Texas Constitution .....

POINT OF ERROR NUMBER 2: The court erred in failing to grant defense counsel's request for a continuance because three witnesses violated subpoenas in violation of the defendant's Sixth Amendment right under the United States Constitution and Article 1, §10 of Texas Constitution .....

POINT OF ERROR NUMBER 3: The court erred by allowing the State to question the defendant in front of

the jury about the defendant's privilege to retain counsel. Defense counsel objected and requested a mistrial .....

POINT OF ERROR NUMBER 4: The court erred in refusing to grant defense counsel's Motion for a Directed Verdict as required by Texas Code of Criminal Procedure §45.031 because the State failed to prove a prima facie case and therefore defendant was entitled to a directed verdict of "not guilty." .....

POINT OF ERROR NUMBER 5: The court erred in refusing to allow Ruben Castillo, Senior Abatement Officer in the Code Compliance Office for the City of San Antonio, to be certified as an expert witness over the objections of defense counsel .....

POINT OF ERROR NUMBER 6: The court erred in allowing the State to accuse the defendant of being a stalker over the over the objections of defense counsel.....

POINT OF ERROR NUMBER 7: The court erred by allowing the State of question the defendant, during this disorderly conduct trial, about irrelevant and incendiary information such as: whether he owned a gun, where he kept this gun, the last time he used the gun, and if had he ever fired the gun.....

POINT OF ERROR NUMBER 8: Defense counsel submitted in writing the suggested charge for the jury, but the court denied the request. The omission of this charge is a misstatement of law. Jury Charge Number 1 – United States Constitutional Rights to Speech and Religion. The Court denied the requested instruction over the objections of defense counsel .....

POINT OF ERROR NUMBER 9: Defense counsel submitted in writing the suggested charged for the jury, but the court denied the request. The omission of this charge is a misstatement of law. Jury Charge Number 2 – Texas Constitutional Right to Speech. The court denied the requested instruction over the objections of defense counsel.....

POINT OF ERROR NUMBER 10: Defense counsel submitted in writing the suggested charge for the jury, but the court denied the request. Jury Charge Number 3 – Texas Constitutional Right to Free Exercise of Religion. The Court denied the requested instruction over the objections of defense counsel .....

POINT OF ERROR NUMBER 11: Defense counsel submitted in writing the suggested charge for the jury, but the court denied the request. The omission of this charge is a misstatement of law. Jury Charge Number 7 – Unreasonable Noise Presumption. The Court allowed only the definition of noise.....

POINT OF ERROR NUMBER 12: Defense counsel submitted in writing the suggested charge for the jury, but the court denied the request. The omission of this charge is a misstatement of law. The court denied a handwritten instruction that the jury be allowed to consider in its deliberations why certain witnesses were unavailable at trial. The Court denied the requested instruction over the objections of defense counsel.....

App. 20

JUDGMENT OF THE COUNTY COURT-AT-LAW #3

The Court (Court County at-Law #3) of Bexar County. OVERRULES all Appellant's Points of Error, 1 thru 12.

The jury in the Municipal Court of San Antonio is upheld as to conviction and punishment of Appellant/ Defendant.

Judgment in this Court (County Court at Law #3) is for Appellee, City of San Antonio SIGNED this the 22nd day of MAY, 2000.

/s/ Claude D. Davis
VISITING JUDGE,
COUNTY COURT AT
LAW NO. #3

APPENDIX D

JUDGEMENT OF THE COURT

NO. B 761743

IN THE MUNICIPAL COURT OF THE CITY OF SAN ANTONIO, BEXAR COUNTY, TEXAS. THE STATE OF TEXAS VERSUS MARION THOMPSON SUSPECT.

ON THIS, 15th DAY OF February, 199,9 THE ABOVE NUMBERED CAUSE BEING CALLED FOR TRIAL, AND THE ABOVE SUSPECT AND/OR HER/HIS ATTORNEY APPEARED IN OPEN COURT. THE STATE WAS REPRESENTED BY HIS/HER CITY ATTORNEY. HAVING BEEN INFORMED OF HIS/HER RIGHT TO TRIAL, THE ABOVE SUSPECT ENTERED HIS/HER APPEARANCE AND ANNOUNCED READY FOR TRIAL, (~~WAIVED~~ - REQUESTED) A JURY, AND ENTERED A PLEA OF NOT GUILTY IN OPEN COURT; AND AFTER HEARING THE EVIDENCE AND ARGUMENT, AND AFTER DUE CONSIDERATION OF SAME THIS (~~COURT~~ - JURY) FINDS THE ABOVE SUSPECT GUILTY OF THE OFFENSE CHARGED IN THE COMPLAINT IN THIS CAUSE.

IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT THAT THE STATE OF TEXAS FOR THE USE AND BENEFIT OF THE CITY OF SAN ANTONIO, BEXAR COUNTY, TEXAS, DO HAVE AND RECOVER OF THE ABOVE SUSPECT, THE SUM OF $150.00, THE FINE ASSESSED AND ALL COSTS IN THIS CASE INCURRED, FOR WHICH EXECUTION WILL ISSUE AND IN DEFAULT OF PAYMENT, THAT THE ABOVE SUSPECT BE COMMITTED TO JAIL UNTIL SAID FINE AND COSTS ARE PAID.

App. 22

DEFENDANT 3/7/99 /s/ Michael Quinn
JUDGE, MUNICIPAL COURT,
CITY OF SAN ANTONIO
BEXAR COUNTY, TEXAS.

ON THIS, __ DAY OF __, 19__.

THIS CASE IS ORDERED DISMISSED ON THE GROUNDS STATED IN THE (STATE'S - SUSPECT MOTION NOTED IN THE MINUTES FOR THIS CAUSE.

_____
JUDGE, MUNICIPAL COURT,
CITY OF SAN ANTONIO
BEXAR COUNTY, TEXAS

APPENDIX E

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308. CAPITOL STATION,
AUSTIN, TEXAS 78711

August 1, 2001
COA#: 04-00-00348-CR
RE: Case No. 0706-01
STYLE: THOMPSON, MARION

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

(JUDGE KELLER WOULD GRANT)

APPENDIX F

Penal Code § 42.01. DISORDERLY CONDUCT

(A) A person commits an offense if he intentionally or knowingly:

(1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;

(2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace;

(3) creates, by chemical means, a noxious and unreasonable odor in a public place;

(4) abuses or threatens a person in a public place in an obviously offensive manner;

(5) makes unreasonable noise in a public place other than a sport shooting range, as defined by Section 250.001, Local Government Code, or in or near a private residence that he has no right to occupy;

(6) fights with another in a public place;

(7) enters on the property of another and for a lewd or unlawful purpose looks into a dwelling on the property through any window or other opening in the dwelling;

(8) while on the premises of a hotel or comparable establishment, for a lewd or unlawful purpose looks into a guest room not his own through a window or other opening in the room;

(9) discharges a firearm in a public place other than a public road or a sport shooting range, as defined by Section 250.001, Local Government Code;

(10) displays a firearm or other deadly weapon in a public place in a manner calculated to alarm;

(11) discharges a firearm on or across a public road; or

(12) exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act.

(b) It is a defense to prosecution under Subsection (a)(4) that the actor had significant provocation for his abusive or threatening conduct.

(c) For purposes of this section:

(1) an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence; and

(2) a noise is presumed to be unreasonable if the noise exceeds a decibel level of 85 after the person making the noise receives notice from a magistrate or peace officer that the noise is a public nuisance.

(d) An offense under this section is a Class C misdemeanor unless committed under Subsection (a)(9) or (a)(10), in which event it is a Class B misdemeanor.

APPENDIX G

Penal Code § 42.04. DEFENSE WHEN CONDUCT CONSISTS OF SPEECH OR OTHER EXPRESSION

(a) If conduct that would otherwise violate Section 42.01(a)(5) (Unreasonable Noise) or 42.03 (Obstructing Passageway) consists of speech or other communication, of gathering with others to hear or observe such speech or communication, or of gathering with others to picket or otherwise express in a nonviolent manner a position on social, economic, political, or religious questions, the actor must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest if he has not yet intentionally harmed the interests of others which those sections seek to protect.

(b) The order required by this section may be given by a peace officer, a fireman, a person with authority to control the use of the premises, or any person directly affected by the violation.

(c) It is a defense to prosecution under Section 42.01(a)(5) or 42.03:

(1) that in circumstances in which this section requires an order no order was given;

(2) that an order, if given, was manifestly unreasonable in scope; or

(3) that an order, if given, was promptly obeyed.

APPENDIX H

San Antonio Police Department Incident Report

Case Number 98/193605
Type of Report: Assignment Report

* * *

Offense: Disorderly Conduct (5)
Location of Offense: 5800 Blk of Joiner Ave.
District 7160
Date of Occurrence: 04-04-98
Hour of Occurrence: 1040 hrs.
Reporting Officer/Badge: R. Urdiales #1386
Date: 04-04-98

Approved by NB040598
Badge 3229

Complainant: Nancy Snodgieoss
Race: W
Sex: F
Age or DOB: 09-05-50
Residence: Refused
Business: 5838 Joiner Ave.
Phone: 681-4353
Time: D

O1: Gary Zinda
Race: W
Sex: M
Age or DOB 07-06-64
Residence: 5011 Glen Ridge, Apt. 221
Phone: 509-6654
Time: N
Business Address: 5838 Joiner Ave.
Phone: 681-4353
Time: D

O2: Stanley Joseph Paterka
Race: W
Sex: M
Age or DOB: 08-21-66
Residence: 724 Ottawa Way
Phone: Refused
Time: B
Business Address: None

O3: Sgt. E. Lambert #3309
Refused
Business: 5020 Prue Rd.
Phone: 207-7425
Time: D

* * *

AP: Marian Shane Thompson
Full Address: 14917 Morning Tree
Race: W
Sex: M
Age or DOB: 12-02-44
Hair: White
Eyes: Brn
Height: 600
Weight: 170

Charges: Disorderly Conduct (A) 5

Details: Dispatched to the above location for a disturbance. People at the front of the location using megaphones and yelling to people inside the above location. (C) said (AP) on was yelling using a megaphone which is annoying her and patients at the clinic.

(O1) said (AP) and the members of his group have been out causing adisturbance (noise) using the megaphone.

(AP) was arrested for disorderly conduct, making unreasonable noise in a public other than a sports shooting

range in or near a private residence that he has the right to occupy.

The cardboard megaphone was placed in the property room as evidence K-290395. (AP's) vehicle was released to (O2).

Vehicle 1 Suspect
Case Number 98/193605
License Number 313 UUN
Year 97
State TX
Type 20
Vehicle Year 1979
Make TOYT
Model Corolla
Style 2 Dr.
Vin TE31641771

Across the street was a mobile home park about 50 feet away. AP was then transported to 401 S. Frio to be booked on the offense. AP was arrested at the authority of O3.